second, where both the donor and the donee have access to the box. In the latter case unless the donor gives up his means of access, the key, delivery is incomplete.[15] In the former case the sufficiency of delivery should not be affected by the fact that another than the donor has access to the box, provided the donor gives to the donee his means of access to it.[16]

R. C. F.

INSURANCE: MISREPRESENTATION: LIMITATION ON BINDING EFFECT OF INFORMATION GAINED BY AGENT.—In making application for insurance on his life the insured signed the following form: "Whenever nothing is written in the following paragraph it is agreed that the declaration is true without exception. . . . . (2) I have never had any of the following complaints or diseases: Apoplexy—Fits or Convulsions, etc., except—" Here follows a blank space in which exceptions were to be noted and which contained the printed words "I have stated all exceptions." Since no exception was entered above insured's signature there arose a breach of material warranty, inasmuch as he knew himself to be subject to recurring fits and convulsions.

In *Westphall v. Metropolitan Life Insurance Company*[1] the insured set up as a defense to the breach of warranty that the company's medical examiner had gained information regarding the insured's health which he had failed to insert in the application. This brought before the court the question of the validity of the following limitation upon the liability of the insurer for the uncommunicated knowledge of his agent: "Inasmuch as only the officers of the company have authority to determine whether a policy shall issue upon the application and as they act on the written statements herein made, no information given by or to the company's agent shall be binding upon the company unless communicated to the officers." The court upheld the validity of the limitation and thereupon excluded, as falling within its terms, evidence offered by the plaintiff tending to show that the medical examiner in performing his duties had learned that the insured was subject to epilepsy and had failed to communicate the same to the company. The validity of the same or a similar limitation upon the principal's liability for the knowledge of his agent has been upheld in this[2] and other states[3]

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[15] Bauerschmidt v. Bauerschmidt (1903), 97 Md. 35, 54 Atl. 637; Contra, Gilkinson v. Third Ave. R. R. Co. (1900), 47 App. Div. 472, 63 N. Y. Supp. 792. See also Page v. Lewis (1892), 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170.

[16] The language in the principal case seems contra.

[1] (June 23, 1915), 21 Cal. App. Dec. 4, 151 Pac. 159.

[2] Iverson v. Metropolitan Life Ins. Co. (1907), 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866, is the leading California case, citing New York Life v. Fletcher (1886), 117 U. S. 519, 29 L. Ed. 934, 6 Sup. Ct. Rep. 837; Northern Ass. Co. v. Bldg. Ass'n. (1902), 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133, based on parol evidence rule. Accord, Madsen v. Maryland Casualty Co. (1914), 168 Cal. 204, 142 Pac. 51.

[3] Haapa v. Metropolitan Life Ins. Co. (1907), 150 Mich. 467, 114

and by the United States Supreme Court.[4] Upon the soundness of such decisions, from the viewpoint of public policy, courts and writers disagree, and though the case at bar rests on precedent, yet the weight of authority is opposed to this view.[5]

The broad principle of agency holds the principal liable for the acts of his agent performed in the course of his employment, and a sane public policy prevents the parties by express limitation from rendering nugatory a positive rule of law.[6] Following this principle, it is well established in most jurisdictions that any limitation is invalid by which the principal attempts to cast the burden of the agent's uncommunicated knowledge upon an innocent third party dealing with him.[7] Where there is an agency there should be with it the attending burdens of responsibility. These burdens should exist where the agent is without authority to issue the policy as well as where he issues the policy himself.[8] They should also exist

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N. W. 380, 16 L. R. A. (N. S.) 1165, and cases cited are based on parol evidence rule.

[4] New York Life v. Fletcher (1886), 117 U. S. 519, 29 L. Ed. 934, 6 Sup. Ct. Rep. 837, is the leading case. Accord, Maier v. Fidelity Mut. Life Assn. (1897), 78 Fed. 566; Dimick v. Metropolitan Life Ins. Co. (1903), 69 N. J. Law 384, 55 Atl. 291; McCoy v. Metropolitan Life Ins. Co. (1882), 133 Mass. 82. Semble, Aetna Life Ins. Co. v. Moore (1913), 231 U. S. 543. But see cases in Cooley's Briefs on Insurance, vol. 3, p. 2578; and Sawyer v. Equitable Ins. Co. (1890), 42 Fed. 30, limiting the leading case.

[5] Rowley v. Ins. Co. (1867), 36 N. Y. 550, 9 Am. St. Rep. 232; Ins. Co. v. Chamberlain (1889), 132 U. S. 304, 33 L. Ed. 341, 10 Sup. Ct. Rep. 87; N. Y. Life v. Russell (1896), 77 Fed. 94; Sternaman v. Metropolitan Life Ins. Co. (1902), 170 N. Y. 13, 62 N. E. 763, 51 L. R. A. 318; Parno v. Ins. Co. (1901), 114 Iowa, 132, 86 N. W. 216; Fishblate v. Fid. Cas. Co. of N. Y. (1906), 140 N. Car. 589, 53 S. E. 354; Ross-Langford v. Ins. Co. (1902), 97 Mo. App. 79, 71 S. W. 720; Reardon v. State Mut. Ins. Co. (1908), 79 S. Car. 576, 60 S. E. 1106; Pacific Mutual Life v. Van Fleet (1910), 47 Colo. 401, 107 Pac. 1087; cases cited by Vance, Insurance, p. 339, note 144. See also ibid., pp. 302-305, p. 316, pp. 322-342; Cooley's Briefs, vol. 3, pp. 2560-2569, pp. 2577-2579, and note 107 Am. St. Rep. 108.

[6] Sternaman v. Metropolitan Life, supra; Parsons v. Ins. Co. (1896), 132 Mo. 590; Mesterman v. Ins. Co. (1893), 5 Wash. 524; but contra, Ryan v. World Mutual Life (1874), 41 Conn. 168; N. Y. Life v. Fletcher, supra.

[7] Similar limitations held invalid are, "Agent shall be considered agent of the insured," Union Mutual Life v. Wilkinson (1871), 13 Wall. 222, 20 L. Ed. 617; Nor. Ass. Co. v. Bldg. Assn. (1906), 203 U. S. 106, 51 L. Ed. 109, 27 Sup. Ct. Rep. 27; Wheaton v. N. Brit. & Mercantile Co. (1888), 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; or "No agent is authorized to waive any condition," see cases in Cooley's Briefs, vol. 3, p. 2605; but contra, Mass., Neb., Cal., when the policy provides a mode of waiver; Sharman v. Cont. Ins. Co. (1914), 167 Cal. 117, 138 Pac. 708; Belden v. Union Cent. Life (1914), 167 Cal. 740, 798, 141 Pac. 370.

[8] Where the agent has authority to issue policies and alter or waive conditions by endorsement only, the company is estopped to deny his power to waive the same orally, Penman v. St. Paul Ins. Co. (1910), 216 U. S. 311, 54 L. Ed. 493, 30 Sup. Ct. Rep. 312; Northern Ass. Co. v. Bldg. Assn., supra; Menk v. Home Ins. Co. (1888), 76 Cal. 50, 14 Pac.

whether there is or is not a limitation, or whether or not there is notice of such limitation.[9] Of course if there is collusion between the agent and the insured,[10] the latter is estopped to assert his rights.

It is to be lamented that the trend of California decisions is to permit the contract of the parties drawn by the insurer to render nugatory a rule of law so evidently in the interests of justice. In the principal case the court might, notwithstanding the precedents, have declined to hold the limitation valid without doing much violence to the California rule, because of the peculiar facts of the case. Instead of being a series of direct answers to questions which must necessarily have been asked by the examiner, the examination took the form of a series of affirmative statements in fine print, all of which the examiner, through negligence, fraud, or mistake, might easily fail to read to the applicant or fail to make notation of answers, and of the existence of which it is difficult to suppose that the insured had notice. Upon the rule of the principal's responsibility for the fraud,[11] negligence,[12] or mistake of his agent in the scope of his employment, the company should be estopped to assert the limitation. The nature of this rather uncommon and antiquated form of application not only tends to increase the possibility of negligence on the part of the agent,[13] but is particularly vicious in that it becomes a trap for the unwary and so makes a stronger case against the validity of the limitation. It is just such forms as this that have aroused the prejudice of courts against insurance companies.

C. P. W.

837, 18 Pac. 117, 9 Am. St. Rep. 158. This is usually the case of fire insurance policies, 15 Harvard Law Review, 575.

[9] N. Y. Life v. Fletcher, supra, at p. 530, based notice on a request in the policy for correction of mistakes. Failure to comply was there held sufficient to raise an estoppel against the insured. "There was a duty to read the policy." Usually no such duty exists (Kister v. Lebanon Mut. Ins. Co. (1899), 128 Pa. 553, 18 Atl. 447) and clearly not where, as here, the information was in affirmative form such that the signature made it complete.

[10] The insured in N. Y. Life v. Fletcher, supra, had such knowledge of the non-communication by the agent as to warrant presumption of collusion, and therefore he could not recover.

[11] N. Y., N. H., & H. v. Schuyler (1865), 34 N. Y. 39; Lyon v. United Moderns (1906), 148 Cal. 470, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 296, note 19 L. R. A. 381; Cooley's Briefs, vol. 3, p. 2594. But semble contra, Moore v. Bank (1883), 111 U. S. 156, 28 L. Ed. 385, 4 Sup. Ct. Rep. 345.

[12] Lyon v. United Moderns, supra, distinguished in principal case but at the same time the court refused to admit evidence proving substantially the same facts.

[13] Laying stress on the affirmative nature of the statements, the court says "there was no need to have the questions asked." Merely attaching the signature of the insured binds him, which is an inducement to negligence and fraud.